No. 07-141

In the Supreme Court of the United States

PUBLIC CITIZEN, PETITIONER

v.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
MARK B. STERN
ALISA B. KLEIN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether, when an enrolled bill has been signed by the presiding officers of both Houses of Congress and by the President of the United States, its authentication as a bill that passed Congress is "complete and unimpeachable." *Marshall Field & Co.* v. *Clark*, 143 U.S. 649, 672 (1892).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 486 F.3d 1342. The opinion of the district court (Pet. App. 25a-63a) is reported at 451 F. Supp. 2d 109.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 2007. The petition for a writ of certiorari was filed on August 6, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner alleges that the Deficit Reduction Act of 2005 (DRA or Act), Pub. L. No. 109-171, 120 Stat. 4, did not pass both chambers of Congress in identical form

and that its enactment thus did not comport with the bicameral-passage requirement of Article I, Section 7 of the Constitution. The district court dismissed petitioner's complaint and the court of appeals affirmed.

1. To become a law, a bill must be passed by both the House and the Senate, and must be signed by the President. U.S. Const. Art. I, § 7, Cl. 2. Congress has specified procedures for the enactment of legislation. 1 U.S.C. 106. "Every bill or joint resolution in each House of Congress shall, when such bill or resolution passes either House, be printed, and such printed copy shall be called the engrossed bill or resolution as the case may be." *Ibid.* "Said engrossed bill or resolution shall be signed by the Clerk of the House or the Secretary of the Senate, and shall be sent to the other House, and in that form shall be dealt with by that House and its officers, and, if passed, returned signed by said Clerk or Secretary." *Ibid.* "When such bill, or joint resolution shall have passed both Houses, it shall be printed and shall then be called the enrolled bill, or joint resolution, as the case may be, and shall be signed by the presiding officers of both Houses and sent to the President of the United States." *Ibid.*

2. Petitioner alleges that the enactment of the Deficit Reduction Act in the fall of 2005 did not comport with the bicameral-passage requirement of Article I, Section 7 of the Constitution. Pet. App. 2a. The DRA has ten titles addressing a wide array of subjects. See 120 Stat. 4. It amended a variety of statutes, including the Federal Deposit Insurance Act, 12 U.S.C. 1811 *et seq.*, the Communications Act of 1934, 47 U.S.C. 151 *et seq.*, and the Social Security Act, 42 U.S.C. 301 *et seq.* Pet. App. 4a. Among other things, it made extensive changes to the Medicaid and Medicare laws, provided relief for vic-

tims of Hurricane Katrina, created a program through which households may obtain coupons to defray the cost of digital-to-analog converter boxes for their televisions, and increased by $100 the fee for filing a civil action in a federal district court. *Ibid.* Petitioner alleges that it was injured by the Act's increase in the filing fee for civil actions. *Ibid.*

According to the facts alleged in the complaint—which have not been admitted—the House and Senate passed different versions of a budget bill referred to as S. 1932, 105th Cong., 1st Sess. (2005). Pet. App. 5a. The legislation was sent to a conference committee, which produced a conference report that failed to pass the Senate. *Ibid.* The Senate then passed an amended version of S. 1932. *Ibid.* In the process of engrossing the bill, a Senate clerk allegedly made an error affecting a provision that authorizes Medicare reimbursement for the rental of certain durable medical equipment, changing the number of months for which reimbursement was available from 13 to 36. *Ibid.* The House of Representatives then allegedly voted on the engrossed bill, including the erroneous duration figure, before returning the bill to the Senate for enrollment. *Ibid.* The Senate clerk allegedly recognized the transcription error in the engrossed bill and included the 13-month figure in the enrolled bill. *Ibid.*

There is no dispute that the "enrolled" version of the DRA was signed by the Speaker of the House of Representatives and the President pro tempore of the Senate, transmitted to the President, and signed by the President. Pet. App. 5a, 15a.

3. The district court dismissed petitioner's complaint, holding that even if the allegations of the complaint are true, petitioner's claim is foreclosed by *Mar-*

shall Field & Co. v. *Clark*, 143 U.S. 649 (1892). Pet. App. 25a-63a. The court explained that "the 'enrolled bill rule' of *Marshall Field* requires the Court to accept the signatures of the Speaker of the House and President pro tempore of the Senate on the enrolled bill as 'complete and unimpeachable' evidence that the bill has been passed by both chambers of Congress." *Id.* at 38a.

4. The court of appeals affirmed. Pet. App. 1a-24a. It explained that *Marshall Field* "crafted a clear rule: '[I]t is not competent for [a party raising a bicameralism challenge] to show, from the journals of either house, from the reports of committees or from other documents printed by authority of Congress, that [an] enrolled bill' differs from that actually passed by Congress." *Id.* at 14a (quoting *Marshall Field*, 143 U.S. at 680). Instead, the court of appeals explained, "[t]he only 'evidence upon which a court may act when the issue is made as to whether a bill . . . asserted to have become a law, was or was not passed by Congress' is an enrolled act attested to by declaration of 'the two houses, through their presiding officers.'" *Ibid.* (quoting *Marshall Field*, 143 U.S. at 670, 672). "An enrolled bill, 'thus attested,' 'is conclusive evidence that it was passed by Congress.'" *Ibid.* (quoting *Marshall Field*, 143 U.S. at 672-673).

The court of appeals explained that *Marshall Field* rested its conclusion upon two rationales, both of which remain relevant today. Pet. App. 13a. First, the court explained that it would be "[b]etter, far better, that a provision should occasionally find its way into the statute through mistake, or even fraud, than that every act . . . should at any and all times be liable to be put in issue and impeached. . . . Such a state of uncertainty in the statute laws of the land would lead to mischiefs absolutely intolerable." *Id.* at 14a (quoting *Marshall*

Field, 143 U.S. at 675). Second, *Marshall Field* "based its holding on separation of powers concerns, citing 'the respect due to a coordinate branch of the government.'" *Ibid.* (quoting *Marshall Field*, 143 U.S. at 673).

The court of appeals "easily reject[ed]" petitioner's contention that *Marshall Field* restricted the use of only one type of evidence—the journals kept by Congress pursuant to the Journal Clause of the Constitution (Art. I, § 5, Cl. 3)—and allowed other forms of evidence to be used to impeach an authenticated enrolled bill. Pet. App. 15a-16a. The court explained that *Marshall Field* "first held that 'the enrollment itself is the record, which is conclusive as to what the statute is,'" and then "confirmed that 'it is not competent for the appellants to show, from the journals of either house, from the reports of committees *or from other documents printed by authority of Congress*, that the enrolled bill . . . as finally passed, contained a section that does not appear in the enrolled act.'" *Id.* at 16a (emphasis added) (quoting *Marshall Field*, 143 U.S. at 675, 680).

The court of appeals also rejected the contention that an "oblique footnote" in *United States* v. *Munoz-Flores*, 495 U.S. 385 (1990), overturned or modified the enrolled bill rule of *Marshall Field*. Pet. App. 18a. The court observed that *Munoz-Flores* "did not in any way involve the question raised in *Marshall Field*, *i.e.*, whether an authenticated enrolled bill had passed Congress." *Id.* at 21a. "The question instead was whether a provision that unquestionably had passed Congress constituted a bill for raising revenue," and, the court concluded, *Munoz-Flores* "is clear on one point: the Court did not mean to overturn or modify the enrolled bill rule of *Marshall Field*." *Ibid.*

ARGUMENT

The court of appeals correctly held that petitioner's claim is foreclosed by the enrolled bill rule of *Marshall Field & Co.* v. *Clark*, 143 U.S. 649 (1892). The other court of appeals, and all five district courts, that have addressed the issue with respect to the Deficit Reduction Act of 2005 have unanimously reached the same conclusion. See *OneSimpleLoan* v. *United States Sec'y of Educ.*, 496 F.3d 197 (2d Cir. 2007), petition for cert. pending, No. 07-492 (filed Oct. 10, 2007); *Zeigler* v. *Gonzales*, No. 06-0080-CG-M, 2007 WL 1875945 (S.D. Ala. June 28, 2007); *Conyers* v. *Bush*, No. 06-11972, 2006 WL 3834224 (E.D. Mich. Nov. 6, 2006); Pet. App. 25a-63a; *California Dep't of Soc. Servs.* v. *Leavitt*, 444 F. Supp. 2d 1088 (E.D. Cal. 2006); *OneSimpleLoan* v. *United States Sec'y of Educ.*, No. 06 Civ. 2979, 2006 WL 1596768 (S.D.N.Y. June 9, 2006), aff'd, 496 F.3d 197 (2d Cir. 2007), petition for cert. pending, No. 07-492 (filed Oct. 10, 2007). Although petitioner urges this Court to overrule its century-old precedent, the vital public policy and separation of powers concerns that animated *Marshall Field* are as powerful today as when *Marshall Field* was decided. The petition should be denied.[1]

1. Petitioner concedes (Pet. 7) that the enrolled bill was signed by the presiding officers of the Senate and the House of Representatives before transmittal to the President. Under *Marshall Field*, that concession resolves the inquiry: petitioner may not seek to prove,

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[1] The court of appeals did not reach the government's argument that petitioner lacks standing. Pet. App. 7a-12a. Because the enrolled bill rule is a non-merits threshold rule designed to preclude judicial inquiry, this Court, like the court of appeals, can consider it without addressing petitioner's standing. See, *e.g.*, *Sinochem Int'l Co.* v. *Malaysia Int'l Shipping Corp.*, 127 S. Ct. 1184, 1191-1193 (2007); Pet. App. 10a-12a.

through extrinsic evidence, that the enrolled bill was not, in fact, identical to the bill passed by both chambers.

In *Marshall Field*, several importers challenged duties that had been assessed under the Act of Oct. 1, 1890, ch. 1244, 26 Stat. 567. The importers argued that the act omitted a provision that had been passed by Congress, and that it therefore was not a valid law. *Marshall Field*, 143 U.S. at 662-669.

This Court observed that "[t]here is no authority in the presiding officers of the House of Representatives and the Senate to attest by their signatures, nor in the president to approve * * * any bill not passed by Congress." *Marshall Field*, 143 U.S. at 669. The Court stressed, however, that the question before it was "the nature of the evidence upon which a court may act when the issue is made as to whether a bill, originating in the House of Representatives or the Senate, and asserted to have become a law, was or was not passed by Congress." *Id.* at 670. The Court held that principles of interbranch comity require the Judicial Branch to accept the signatures of the presiding officers of Congress and the President of the United States on the enrolled bill as "complete and unimpeachable" evidence that the bill passed Congress. *Id.* at 672.

The *Marshall Field* Court explained that "[t]he signing by the Speaker of the House of Representatives, and by the President of the Senate, in open session, of an enrolled bill, is an official attestation by the two houses of such bill as one that has passed Congress." 143 U.S. at 672. Such a bill "carries on its face a solemn assurance by the legislative and executive departments of the government, charged, respectively, with the duty of enacting and executing the laws, that it was passed by Con-

gress." *Ibid.* Accordingly, "[t]he respect due to coequal and independent departments requires the judicial department to act upon that assurance, and to accept, as having passed Congress, all bills authenticated in the manner stated." *Ibid.*

This Court emphasized "the consequences that must result if this court should feel obliged, in fidelity to the Constitution, to declare that an enrolled bill, on which depend public and private interests of vast magnitude, and which has been authenticated by the signatures of the presiding officers of the two houses of Congress, and by the approval of the President, and been deposited in the public archives, *as an act of Congress*, was not in fact passed by the House of Representatives and the Senate, and therefore did not become a law." *Marshall Field*, 143 U.S. at 670. "Better, far better, that a provision should occasionally find its way into the statute through mistake, or even fraud, than that every act * * * should at any and all times be liable to be put in issue and impeached by the journals, loose papers of the legislature and parole evidence. Such a state of uncertainty in the statute laws of the land would lead to mischiefs absolutely intolerable." *Id.* at 675 (quoting *Sherman* v. *Story*, 30 Cal. 253, 275 (1866)).

2. Petitioner contends (Pet. 12-16) that *Marshall Field* restricts the use of only one form of evidence—the journals kept by Congress pursuant to the Journals Clause—and allows the impeachment of an authenticated enrolled bill through other forms of extrinsic evidence, such as an engrossed bill. As the court of appeals explained, however, "[n]othing in the *Marshall Field* opinion purports to limit application of the enrolled bill rule to journal-based challenges." Pet. App. 16a. The *Marshall Field* Court held broadly that the signatures

of the presiding officers of Congress and the President on an enrolled bill are "complete and unimpeachable" evidence that the bill passed Congress. 143 U.S. at 672. And in *Marshall Field* itself, the plaintiffs relied not only on congressional journals, but also on "reports of committees of each house, reports of committees of conference, and other papers printed by authority of Congress." *Id.* at 669.

Indeed, it would make "little sense" to exclude "the legislative journals that the Constitution requires, but leav[e] the door open to the use of documents of some lesser stature under the law—that would elevate other evidence over evidence that the Constitution requires Congress to maintain." Pet. App. 44a. Moreover, as the court of appeals explained, "neither of the [*Marshall Field*] Court's rationales applies solely to impeachment by journals." *Id.* at 16a. "No less 'uncertainty in the statute laws' upon which 'depend public and private interests of vast magnitude,' would result from allowing collateral attack of the enrolled bill by congressional documents other than journals." *Ibid.* (citation omitted). "And 'the spectacle of examination of journals by [the courts]' no more 'subordinates the legislature' * * * than does inspection of other materials." *Ibid.* (citation omitted).

3. Petitioner essentially contends (Pet. 16-19) that a footnote in *United States* v. *Munoz-Flores*, 495 U.S. 385 (1990), cabined *Marshall Field* to such an extent that *Marshall Field* no longer applies to bicameralism challenges (such as the bicameralism challenge in *Marshall Field* itself). That is incorrect.

Munoz-Flores did not involve the question whether a bill had passed both Houses of Congress. Rather, the question was whether a provision that unquestionably

had passed Congress was a bill for raising revenue. *Munoz-Flores*, 495 U.S. at 387-388. If so, the Constitution required that the provision originate in the House of Representatives. U.S. Const. Art. I, § 7, Cl. 1. The Court found "consideration of [the] origination question 'unnecessary'" because it determined that the challenged bill "was not one for raising revenue." *Munoz-Flores*, 495 U.S. at 401 (quoting *Twin City Bank* v. *Nebeker*, 167 U.S. 196, 203 (1897)).

In a footnote, the Court also rejected the contention that the Origination Clause question was non-justiciable under *Marshall Field*. *Munoz-Flores*, 495 U.S. at 391 n.4. In doing so, the Court stated that *Marshall Field* is inapplicable "[w]here * * * a constitutional provision *is* implicated." *Id.* at 392 n.4. While the precise meaning of that sentence is unclear, the court of appeals correctly explained that "the footnote is clear on one point: the Court did not mean to overturn or modify the enrolled bill rule of *Marshall Field*." Pet. App. 21a. Rather, the footnote in *Munoz-Flores* correctly explained that *Marshall Field* "concerned 'the nature of the evidence' the Court would consider in determining whether a bill had actually passed Congress," and that "'[t]he respect due to coequal and independent departments' demands that the courts accept as passed all bills authenticated in the manner provided by Congress." 495 U.S. at 391-392 n.4 (quoting *Marshall Field*, 143 U.S. at 670, 672). Thus, "[w]hatever plausible alternative interpretations may be supported by the language of the 'oblique footnote,' [petitioner's] reading is not one of them." *OneSimpleLoan*, 496 F.3d at 207.

Three years after *Munoz-Flores*, this Court confirmed that the *Marshall Field* doctrine concerns "'the nature of the evidence' the Court [may] consider in de-

termining whether a bill had actually passed Congress," and that, under *Marshall Field*, "a law consists of the 'enrolled bill,' signed in open session by the Speaker of the House of Representatives and the President of the Senate." *United States Nat'l Bank* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 n.7 (1993) (quoting *Munoz-Flores*, 495 U.S. at 391 n.4, and *Marshall Field*, 143 U.S. at 672). That is fatal to petitioner's contention that *Marshall Field* no longer stands for that proposition.

4. Petitioner (Pet. 19) eventually gets to the heart of the matter by arguing that *Marshall Field* should be overruled. In petitioner's view (Pet. 19), the "concerns behind that decision * * * are of far less significance today."

a. Circumstances have not, however, changed meaningfully. Now as when *Marshall Field* was decided, clerical errors may occur, but the task of comparing and reconciling the bills passed by each House must be done by Congress itself in the process of enrolling a bill, before presenting it to the President. Once that process is complete, the public is entitled to rely on the attestations of the presiding officers of Congress and the President as unimpeachable assurance that the measure was duly enacted.[2]

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[2] Although petitioner's argument (Pet. 19) rests on "advances in technology," its complaint is premised on the notion that "engrossed bills printed today are subject to error or mishandling." *OneSimpleLoan*, 496 F.3d at 208. "Indeed, such advances may provide new ways to alter a bill's text during the legislative process." *Ibid.* As the House Parliamentarian has explained, the engrossing process can be a "detailed and complicated process" requiring the synthesis of a large number of amendments. Charles W. Johnson, U.S. House of Representatives, *How Our Laws Are Made*, H.R. Doc. No. 93, 108th Cong., 1st Sess. 37 (2003).

The reliance interests on this bill alone—not to mention the thousands of bills enacted since this Court decided *Marshall Field* 115 years ago—are enormous. The DRA has ten titles addressing a wide array of subjects. See 120 Stat. 4. Among other things, it made extensive changes to the Medicaid and Medicare laws, provided relief for victims of Hurricane Katrina, and created a program through which households may obtain coupons to defray the cost of digital-to-analog converter boxes for their televisions. Pet. App. 4a. As the court of appeals explained, "[o]ne need only look to the breadth of the DRA to understand the 'vast magnitude' of 'public and private interests' which depend upon the certainty of statutes." *Id.* at 23a-24a (quoting *Marshall Field*, 143 U.S. at 670).

Nor have the separation-of-powers concerns underlying *Marshall Field* diminished over time. "[T]oday, no less than in 1892, the spectacle of courts directing legislative authentication procedures and otherwise meddling in the inner workings of Congress 'disregards that coequal position . . . of the three [branches] of government.'" Pet. App. 23a-24a (quoting *Marshall Field*, 143 U.S. at 676).

b. Although petitioner (at 19) invokes 1 U.S.C. 106, which was enacted in 1893, that statute codifies the very authentication procedure on which *Marshall Field* was based. It provides for the enrolled bill to be signed by the presiding officers of both Houses before transmittal to the President. See 1 U.S.C. 106; *United States Nat'l Bank*, 508 U.S. at 455 n.7 (noting that in *Marshall Field*, "the Court stated that a law consists of the 'enrolled bill,' signed in open session by the Speaker of the House of Representatives and the President of the Senate, *see*

also 1 U.S.C. § 106") (emphasis added) (quoting *Marshall Field*, 143 U.S. at 672).

Indeed, as the district court observed, petitioner's own arguments underscore the continuing need for the enrolled bill rule. Pet. App. 59a-62a. Although petitioner insists (Pet. 5-6) that the House of Representatives voted on an engrossed bill that included a clerical error, the *Congressional Record* excerpts on which petitioner relies indicate only that the House voted on H.R. Res. 653. The *Congressional Record* does not specify that H.R. Res. 653 is the engrossed bill that petitioner presumes it to be. See Pet. App. 60a & n.24; Gov't C.A. Br. 26-28. While the House should have voted on the engrossed bill, see 1 U.S.C. 106, the whole point of petitioner's case is that Congress allegedly failed to follow required procedures.

As a result, petitioner is essentially asking this Court to "replac[e] the 'enrolled bill rule' as a practical matter with an 'engrossed bill rule.'" Pet. App. 61a. An enrolled bill, however, has weightier indicia of accuracy than an engrossed bill, because it is signed by the presiding officer of each House of Congress, as opposed to a clerk. See 1 U.S.C. 106. In any event, there is little sense in overruling a century-old precedent in order to replace the enrolled bill rule with an engrossed bill rule.

5. Finally, while the overruling of *Marshall Field* would be extremely unsettling, it is not clear how often this issue arises. With *Marshall Field* in place, the issue appears to have recurred only rarely, which provides another reason for not overruling such a well-settled precedent. If *Marshall Field* were overruled, however, litigants would have a strong incentive to scour the *Congressional Record* for evidence of previously unnoticed clerical errors. If few such errors were found, that

would underscore the absence of a compelling reason to grant review in order to consider overruling *Marshall Field*. If numerous such errors were found, that would underscore the enormous reliance interests that the *Marshall Field* rule protects. Either way, *Marshall Field* should not be overruled.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

PETER D. KEISLER
Assistant Attorney General

MARK B. STERN
ALISA B. KLEIN
Attorneys

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